No. 15,954

United States Court of Appeals

For the Ninth Circuit

EDWARD LEWIS SHORT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the State of Alaska, First Division.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, on the grounds following, petitions for rehearing, particularly as to that portion of the opinion of the Court dealing with the failure to endorse the names of the witnesses before the Grand Jury on the indictment.

I. THE COURT ADOPTED AN ERRONEOUS VIEW OF THE SOPER CASE.

Said the Court (p. 4):

"In Soper v. United States, (1955) 9 Cir., 220 F. 2d 158, only two of the many witnesses appear-

> ing before the Grand Jury were endorsed on the indictment."

Not so. In *Soper* there *were* only two witnesses who appeared before the Grand Jury, and both of their names were properly endorsed on the indictment. An examination of the briefs in that case, on file with this Court, will demonstrate that the suggestion that another witness "might" have appeared before the Grand Jury was a pipe-dream indulged in by appellant's counsel in a moment of desperation. The Court so noted, saying, "Appellant did not prove or attempt to prove, nor does the record show, that any witnesses other than those whose names were endorsed on the indictment appeared before the Grand Jury for the purpose of procuring the indictment; . . ." (p. 160, fn. 3).

Therefore, the entire remark of the Court in the *Soper* case concerning the endorsement of names on the indictment, was the purest of dictum, undiluted by any association with the facts of the case. Wholly unnecessary, it was further unfortunate in that it was not based on any real study of the problem; at least none of the briefs in the case attempted to discuss any authority whatever.

The *Soper* dictum should not be allowed to haunt us longer. It should be laid to rest, one way or the other. It should not be avoided and left hanging in air, as the Court does in this opinion.

II. THE COURT OVERLOOKS THE FACT THAT THE DEFENDANT HERE MADE A TIMELY MOTION TO DISMISS THIS INDICTMENT.

Said the Court:

> "However, we need not reach this question. Appellant has failed to show that this claimed error has been in any way prejudicial to him." (p. 4)

Defendant made a motion to dismiss this indictment, because of the failure to endorse the names of the witnesses thereon, as soon as the indictment was returned. The motion was proper and timely made; it was, none the less, denied.

The statute requiring the names of witnesses to be endorsed on the indictment is a substantial right of the defendant; it is a *mandatory condition precedent to prosecution;* it is not, by any stretch of the imagination, a mere "matter of form".

The cases cited by the Court at this point are completely inapposite: In *Hagner v. U. S.* (1932), 285 U.S. 427, the indictment in question was "loosely and inartificially drawn"; there was no question of ignoring a mandatory procedural requirement. There was no timely objection in any event, as the defendant did not question the indictment until after his trial and conviction. Even so, said the Court:

> "The indictment in the particular complained of is loosely and inartificially drawn and not to be commended, but upon the record before us, *and without deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case*, we are of the opinion

that after verdict it is not vulnerable to the attack here made upon it." (433, emphasis sup.)

So, too, with *Hopper v. U. S.* (C.C.A. 9th, 1943), 142 F. 2d 181, and *Fisher v. U. S.* (C.A. 9th, 1956), 231 F. 2d 99. Both of these cases were concerned with the sufficiency as to form of the charging parts of the indictments. Neither concerned a situation, such as we have in the instant case, where there was a failure to perform a mandatory procedural step.

A. This is a mandatory statute.

Statutes may be classified, where appropriate, as either directory (permissive, advisory), or mandatory. Whether a law is directory or mandatory is usually determined by reference to its language, always with the design of effectuating the expressed legislative intent.

Sutherland says:

"The important distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities.

This distinction grows out of the fundamental differences in the intention of the legislature in enacting the two statutes. Although directory provisions are not intended by the legislature to be disregarded, yet the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply. The

> question of compliance remains for judicial determination. If the legislature considers the provisions sufficiently important that exact compliance is required then the provision is mandatory."
>
> *Sutherland, Statutory Construction* (3rd) Sec. 2801.

We wish the Court would examine the statute in question here through the same eyes with which it examined the statutory provisions in *Triangle Candy Co. v. U. S.* (C.C.A. 9th, 1944), 144 F. 2d 193. In the *Triangle* case the defendant had been convicted of violations of the Federal Food, Drug, and Cosmetic Act. However, the so-called "sample provision" requirement of the act had not been observed. That provision of the law stated as follows:

> "(b) Where a sample of a food, . . . is collected for analysis . . . the Administrator shall, upon request, provide a part of such official sample for . . . analysis by any person . . .".

Was this requirement a "mandatory prerequisite", or merely directory? Said this Court:

> "The statute, saying as it does that samples, with exceptions, *shall* be provided, is in terms mandatory. . . . The problem is always whether construing the statute as providing merely administrative direction would impair the interest, public or private, intended to be protected. . . . If those accused under the Act are not given a portion of the sample, their power to make a complete defense is substantially curtailed." (198-9)

Convictions under the counts so affected, were reversed.

And note the language of Justice Cardozo in *Escoe v. Zerbst* (1935), 295 U.S. 490, where the Supreme Court was considering the interpretation of a statute relative to the revocation of criminal sentences. The act, after providing for arrest of the probationer, went on: "Thereupon such probationer shall forthwith be taken before the Court." Defendant had been so arrested, but was taken directly to prison, and not before the Court. The Supreme Court found the statute clearly mandatory, both from the language of "command", and upon consideration of the aims of Congress in enacting it.

> "If these are the ends to be promoted by bringing the probationer into the presence of his judge, the Act is seen at once to be mandatory in meaning as well as mandatory in form. Statutes are not directory when to put them in that category would result in serious impairment of the public or private interests that they were intended to protect. . . . Such is the situation here." (p. 494)

What are the "public or private interests" afforded protection by a statute requiring the endorsement of witnesses on an indictment? In *State v. Stevens,* (S.D. 1891), 47 N.W. 546 (interpreting an identical statute) the Court said:

> "It must be presumed that this requirement was made for some just and wise purpose. No doubt the object was for the benefit of the accused; to give him the opportunity of knowing who were his accusers, and by whom the state expected to establish the charge preferred, in order that he might be the better prepared to meet it. To pro-

> tect the innocent, and punish the guilty, are the two great objects to be kept in view in the administration of criminal jurisprudence. . . . A person indicted would be put to great disadvantage and hazard when called upon to answer if he were ready for trial, if he was in ignorance of the information as required by this statute. On the other hand, it is for the benefit of the state that the requirement of this statute should be enforced. . . . The statute is a command, coupled with a penalty." (pp. 546-7)

Admittedly, the decisions of the various state supreme Courts on this issue are in no way binding on this Court. But surely the decisions of such Courts, interpreting identical statutes, should be somewhat influential. These state Courts have, uniformly, held these identical statutes to be mandatory and binding according to their terms; they have *not* required, where timely objection has been made, any showing of "Prejudice" in order for the defendant to be entitled to the protection of the law. See, for example, *Cook v. State* (Okla. 1911), 120 Pac. 1038; *People v. Price* (Mich. 1889), 41 N.W. 853; *Andrews v. People* (Ill. 1886), 7 N.E. 265; *State v. Stevens,* supra; *Merris v. Commonwealth* (Ky. 1941), 151 S.W. 2d 1030; *State v. Rickmire* (Minn. 1919), 174 N.W. 529; *State v. Andrew* (Ore., 1899), 58 Pac. 786; *State v. Porter* (Mont. 1950), 220 P. 2d 1035.

The opinion of the Montana Supreme Court in *State v. Porter*, supra, contains an excellent historical analysis of the development of these witness statutes, and a fine summary of the aims of their promotion:

(1) that "secret inquisitions" be discouraged; (2) to protect the State against the cost of frivolous or malicious prosecutions; (3) to enable the person accused to know the witnesses against him; (4) to effectuate the constitutional safeguards entitling the accused to be confronted with his accusers; and (5) to avoid surprise. Said the Montana Court:

> "Concealing the identity of witnesses whose names are required to be revealed to the accused is a return to medievalism and completely foreign to our modern enlightened concepts of justice. . . . The very fact that the witnesses appeared either voluntarily or by subpoena and were present before the Grand Jury indicates that their names were known. In such circumstances it is inexcusable for the state to conceal these witnesses from the accused. The statute requires that their names be endorsed. The history of criminal procedure demonstrates the sound reasons why the accused is entitled to this information. *It is a fundamental right of the accused and depriving him of that right is depriving him of a fair trial.*" (p. 1050)

We submit that these Alaska statutes are mandatory beyond question of a doubt; not only has the legislature said that the names of all witnesses before the Grand Jury "must" be endorsed or inserted (Sec. 66-8-52, A.C.L.A. 1949), but it has declared that in the event of a failure to so endorse or insert, then the indictment "must" be dismissed (Sec. 66-11-1, A.C. L.A. 1949). This is the language of command, and the public and private interests to be promoted are vital.

Consider, if you will, one very pertinent analogy. Section 3422, U.S.C., reads as follows:

> "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Would this Court say that the requirements of *this* statute relative to the names of witnesses are mere "matters of form" constituting only "harmless error" in the absence of a showing of "prejudice"? If so, this Court would be flying directly in the face of the Supreme Court of the United States, which has held otherwise. See *Logan v. U. S.* (1892), 144 U.S. 263. In the *Logan* case, the Court said:

> "The words of the existing statute are too plain to be misunderstood. The defendant, if indicted for treason, is to have delivered to him three days before the trial a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment; . . . The list of witnesses to be required to be handed to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of 'witnesses to be produced on the trial for proving the indictment'. *The provision is not directory only, but mandatory to the government;* and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare a defense. Being

> enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with." (p. 304, emp. sup.)

Aside from the fact that the Alaska statutes are even more "mandatory", if that be possible, what is the difference? How can one statute be permissive, and the other mandatory? The answer is that both are mandatory and should be so treated by this Court.

B. The Court erred in requiring a showing of "prejudice".

Said the Court:

> "Without some showing of prejudice, we hold that appellant's objection is only a matter of form." (p. 4)

We have already shown that the statute is mandatory, and therefore no showing of prejudice is lawfully required; a violation of the law imputes prejudice per se. But, further, to require the defendant to show "prejudice" before an indictment will be dismissed for failure to endorse the names of the witnesses, places an unreasonable and impossible burden upon him, and violates the important policy considerations upon which such statutes are based.

First, one of the reasons for such a requirement is to enable the defendant to show that the indictment was obtained upon improper evidence, or no evidence. For example, an indictment might be based only upon testimony of a police officer, not present at the crime and informed concerning it only by interviews with

actual witnesses. Such an indictment, based solely upon hearsay, would be void. But if the prosecuting attorney is allowed to ignore the statute and return an indictment barren of witnesses, there is no possible way for the defendant to establish that the indictment was unlawfully found.

Second, according to the *Porter* case, supra, such statutes are intended to discourage secret inquisitions (at common law, the witnesses before the Grand Jury were first sworn in open Court), and to protect the state against frivolous or malicious prosecutions. If we permit secrecy concerning the witnesses to be maintained, in spite of the mandate of the law, these policy considerations are out the window, and carte blanche is extended to the slanderer and the personal enemy.

Third, one of the most vital purposes of these laws, according to the authorities, is to enable the defendant to prepare to meet the testimony of particular witnesses, to investigate the background and antecedents of such witnesses, and to obtain material for impeachment, if any such material be available; to avoid injustice arising from surprise. Of course, if the law can be violated with impunity, and no witnesses need be shown, no such preparation is possible. What would it avail the defendant to run around investigating the witnesses *after* the trial is over? Suppose the defendant did discover material for possible impeachment, such as prior conviction of crime, or a prior contradictory statement, in the course of such a post mortem investigation? How would he bring this "possibly impeaching" material before the Appellate

Court? By ex parte affidavit? No, this would indeed be "love's labours lost".

Take the instant case for an example. The defendant had no way of knowing that the witness T. Henry Miller was to testify (r. 167-183). Therefore, the defendant was not fully prepared to present the impeaching material contained in his offer of proof (r. 177), nor to present legal authority in support of his position on the offer.

Even more apparent, the defendant could not possibly have anticipated the testimony of the witness O'Brien (r. 284-291), and therefore left the witness without cross-examination and without any attempt at impeachment. While the witness did not give testimony which seemed at the time particularly relevant, no one can say what his apparent corroboration of some portions of the witness Smith's testimony may have had on the jury. We believe that some effective cross-examination of O'Brien could have been undertaken if we had known he was to be a witness. As it was, we had to drop him, with unknown effect on the jury.

The plain fact is, that the view of this Court that the statute is only available to a defendant when prejudice can be shown means the complete destruction of the statute. Law enforcement officials are not going to follow it unless they have to. It has been rendered completely nugatory, meaningless and void; it no longer has any real existence, any more than if it had been, in fact, repealed.

This is to be regretted, as it tends to preserve the old idea of a criminal trial as a battle of wits and a sporting contest. You have wiped off the books one of the few forward looking steps in criminal procedure in Alaska.

The correct solution of the question concerning the validity of this statute is so important that this Court should grant rehearing on this issue.

Dated, Anchorage, Alaska,
October 19, 1959.

Respectfully submitted,

WENDELL P. KAY,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

Dated, Anchorage, Alaska,
October 19, 1959.

WENDELL P. KAY,
Attorney for Appellant and Petitioner.